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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

* * *

In re

ROBERT A. COOK,

Debtor.

Case No. 11-39335

Chapter 11
DCN WFH-4

**OMNI FINANCIAL, LLC'S
OPPOSITION TO MOTION FOR
APPOINTMENT OF CHAPTER 11
TRUSTEE**

Date: October 25, 2011
Time: 9:30 a.m.
Dept: C

OMNI FINANCIAL, LLC ("Omni"), a creditor herein, hereby opposes
Traynor Marina Investments, LLC's Motion for Appointment of Chapter 11 Trustee (the
"Motion"), as follows:

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I.

INTRODUCTION

Traynor Marina Investments, LLC (“Movant”) has brought its Motion on the grounds that appointment of a trustee is warranted under 11 U.S.C. section 1104 for “cause” and because such appointment would be in the interests of creditors. However, the law strongly presumes that a Chapter 11 debtor will remain in possession of the bankruptcy estate, and appointment of a Chapter 11 trustee is considered to be an extraordinary remedy that should only be exercised in rare circumstances. Although Movant has asserted conclusory allegations of fraud in an effort to show that cause exists for appointment of a Chapter 11 trustee, Movant has failed to meet its burden of proof with respect to those allegations and has further failed to establish other grounds that would constitute cause. Moreover, Movant has failed to show that appointment of a Chapter 11 trustee would be in the interests of all creditors and the bankruptcy estate as a whole. As such, the Motion should be denied.

II.

LEGAL ARGUMENT

A. **APPOINTMENT OF A CHAPTER 11 TRUSTEE IS AN EXTRAORDINARY REMEDY FOR WHICH THE PARTY SEEKING APPOINTMENT BEARS THE BURDEN OF PROOF.**

It is well-established law that the party moving for appointment of a Chapter 11 trustee bears the burden of proof. *See, e.g., In re Sovereign Estates, Ltd.*, 104 B.R. 702 (Bankr. E.D. Pa. 1989); *In re William A. Smith Contr. Co., Inc.*, 77 B.R. 124 (Bankr. N.D. Ohio 1987); *In re Cole*, 66 B.R. 75 (Bankr. E.D. Pa. 1986); *In re St. Louis Globe-Democrat, Inc.*, 63 B.R. 131 (Bankr. E.D. Mo. 1985). Moreover, many courts have held that the standard of proof to be met in a motion for appointment of a Chapter 11 trustee is that of “clear and convincing” evidence. *See, e.g., In re G-I Holdings, Inc.*, 385 F.3d 313 (3d Cir. 2004); *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989); *In re St. Louis Globe-Democrat, Inc.*, 63 B.R. at 138; *In re Evans*, 48 B.R. 46, 47 (Bankr. S.D. Ohio 1985); *In re* ///

1 *Tyler*, 18 B.R. 574, 577 (Bankr. S.D. Fla. 1982); *In re F.A. Potts & Co.*, 20 B.R. 3, 5 (Bankr.
2 E.D. Pa. 1981).

3 In Chapter 11 cases, there is a strong presumption that the debtor should remain in
4 possession, and appointment of a trustee is considered to be an unusual and extraordinary
5 remedy. *See, e.g., In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 471 (3d Cir.
6 1998); *In re Sovereign Estates, Ltd.*, 104 B.R. 702 (Bankr. E.D. Pa. 1989); *In re William A.*
7 *Smith Contr. Co., Inc.*, 77 B.R. 124 (Bankr. N.D. Ohio 1987); *In re Parker Grande*
8 *Development, Inc.*, 64 B.R. 557 (Bankr. S.D. Ind. 1986); *In re Anchorage Boat Sales, Inc.*, 4
9 B.R. 46 (Bankr. W.D. Tex. 1985); *In re Evans*, 48 B.R. 46 (Bankr. S.D. Ohio 1985); *In re*
10 *Eichorn*, 5 B.R. 755 (Bankr. D. Mass. 1980); *Taub v. Taub*, 427 B.R. 208, 225 (Bankr.
11 E.D.N.Y. 2009). Indeed, appointment of a Chapter 11 trustee is the exception, rather than the
12 rule, and the standard required for the appointment of such a trustee will generally only be
13 met in egregious cases. *See* Maguire & Ball, *Collier Guide to Chapter 11: Key Topics and*
14 *Selected Industries*, P 5:10 [3][a] (Matthew Bender & Company, Inc. 2010); *see also In re*
15 *Sharon Steel Corp.*, 871 F.2d at 1225. Because the Movant has not meet its burden of
16 proving that a Chapter 11 trustee is warranted in this case, the Motion should be denied.

17 **B. MOVANT HAS FAILED TO MEET ITS BURDEN OF PROOF THAT**
18 **APPOINTMENT OF A CHAPTER 11 TRUSTEE SHOULD BE ORDERED**
19 **PURSUANT TO 11 U.S.C. SECTION 1104.**

20 11 U.S.C. section 1104, subsection (a), governs the appointment of a trustee in
21 Chapter 11 cases and provides that after a bankruptcy case has been filed, but prior to
22 confirmation of a plan, the court shall order appointment of a trustee as follows:

23 (1) for cause, including fraud, dishonesty, incompetence, or
24 gross mismanagement of the affairs of the debtor by current
25 management, either before or after the commencement of the
26 case, or similar cause, but not including the number of holders
of securities of the debtor or the amount of assets or liabilities
of the debtor; or

27 (2) if such appointment is in the interests of creditors, any
28 equity security holders, and other interests of the estate,

without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 104(a)(1)-(2). However, Movant has failed to establish that cause exists for ordering the appointment of a Chapter 11 trustee in this case or that appointment of a Chapter 11 trustee would otherwise serve the interests of the creditors or the bankruptcy estate. Accordingly, this Court should deny the Motion.

1. Cause Does Not Exist for Ordering the Appointment of a Trustee in this Chapter 11 Case.

Movant's argument that cause exists for appointment of a Chapter 11 trustee is based on mere conclusory allegations that have not been supported by the evidence and do not give rise to cause. Specifically, Movant's allegations in support of its argument that cause exists for ordering the appointment of a trustee can be summarized as follows:

- 1) The Debtor has not yet filed his first monthly operating report that was due on September 15, 2011, and the Debtor *may* be using cash collateral without court approval (*see* Motion, 3:27-4:17);
- 2) Debtor "does not own any assets in his own name" and "has structured his affairs to place his assets behind the shield of various corporations and limited liability companies" (*see* Motion, 2:1-3);
- 3) Debtor and others "induced" Movant to invest in the construction of a marina, subsequently defaulted in his guarantee in favor of the Movant, and now has a Judgment entered against him in favor of Movant (*see* Motion, 2:10-11, 13-16, 18-20);
- 4) Movant has pursued many state law remedies against Debtor in an attempt to collect the Judgment entered in its favor, none of which have yet resulted in the collection of monies (*see* Motion, 2: 20 – 3:1);
- 5) Debtor lists monthly income on his Schedules, which must mean that the Debtor is violating pre-petition state court orders that prohibit the Debtor's

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1 wholly owned entities from making distributions to him (*see* Motion, 3:5-8,
2 4:19-26);

3 6) Debtor “has entered into at least three significant financial transactions,
4 involving millions of dollars, and has no plausible explanation of the
5 disposition of the funds” (*see* Motion, 2:4-6); and

6 7) Because the Debtor seeks to value certain assets and claims certain
7 exemptions, the Debtor must have an irreconcilable conflict of interest in this
8 case (*see* Motion, 7:13-22).

9 However, for the reasons set forth below, none of these allegations are sufficient to establish
10 “cause” for the appointment of a trustee under 11 U.S.C. section 1104.

11 a. **The Debtor’s failure to file a single monthly operating report does**
12 **not constitute cause for appointment of a Chapter 11 trustee, and**
13 **Movant has failed to establish that the Debtor is using cash**
14 **collateral without court approval.**

15 Movant contends that the Debtor’s failure to file a *single* monthly operating report
16 gives rise to cause for appointment of a Chapter 11 trustee. In support of such contention,
17 Movant cites a case that stands for the proposition that a debtor’s refusal to file monthly
18 operating statements constitutes cause for dismissal or conversion. *See In re Tornheim*, 181
19 B.R. 161, 164 (Bankr. S.D.N.Y. 1995). However, it should be noted that the rule cited in that
20 case references monthly operating “statements,” in the plural form, and the Chapter 11
21 debtors in that case had failed to file monthly operating statements for *over one (1) year*. *See*
22 *id.* (emphasis added). The debtors had also failed to file a plan and disclosure statement
23 during the 16 months in which that case had been pending. *Id.* Based on those
24 circumstances, which are drastically different from the circumstances at hand, the court
25 determined that conversion or dismissal was justified. *Id.* As such, the court granted the
26 U.S. Trustee’s motion to dismiss the case. *Id.*

27 Here, the Debtor has only failed to file a single monthly operating report, which was
28 his first such report due in this case. Failure to file a single monthly operating report is
hardly equivalent to failing to file monthly operating reports for more than a year and further

1 failing to file a plan and disclosure statement in nearly a year and a half. While Movant
2 asserts that the Debtor's failure to file his first monthly operating report alone constitutes
3 cause for appointment of a Chapter 11 trustee, such a result would be harsh and extreme. If a
4 Chapter 11 debtor's failure to timely file *just one* required report were enough to justify
5 appointment of a trustee, surely the courts would be appointing Chapter 11 trustees on a
6 much more frequent basis.

7 Movant further argues that the Debtor's failure to file his first monthly operating
8 report suggests that he may be using cash collateral without court approval. However, such
9 an argument is based on mere conjecture and is wholly unsupported by the evidence.
10 Movant, which bears the burden of proof, has failed to establish that the Debtor's post-
11 petition cash is subject to any liens and, as such, should be considered "cash collateral." Still
12 further, Movant has failed to provide a single piece of evidence to establish that the Debtor
13 has been using what might constitute "cash collateral" without obtaining the necessary court
14 approval. Accordingly, Movant has failed to establish that cause exists for the appointment
15 of a Chapter 11 trustee.

16 **b. Movant's ownership and operation of multiple companies does not**
17 **establish cause for appointment of a Chapter 11 trustee.**

18 Movant's argument that the Debtor's ownership and operation of numerous business
19 entities warrants appointment of a Chapter 11 trustee lacks merit and cannot be supported by
20 the evidence. Movant's argument consists of a conclusory allegation that the Debtor holds
21 his assets behind the "shield" of various entities. However, the mere creation, operation,
22 and/or ownership of several legal entities is, in itself, lawful and does not suggest fraud,
23 dishonesty, gross mismanagement, or other cause for appointment of a Chapter 11 trustee.
24 While the Debtor may have participated in some complex business matters involving various
25 corporations, limited liability companies, and partnerships in which he holds an interest,
26 Movant has not offered any evidence to support its allegation that those entities are a
27 "shield," or alter ego, of the Debtor.

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Moreover, the Debtor has listed all of his stock and interests in incorporated and unincorporated businesses as required on Schedule B of this Petition. *See* Schedule B, attached as Exhibit “G” to Motion. Thus, while the assets of the various business entities in which the Debtor owns an interest are not assets of the bankruptcy estate, the Debtor’s interest in those entities *are* assets of the bankruptcy estate and have been fully disclosed by the Debtor. The Debtor’s disclosure of his stock and interests in various businesses is all that is required of him at this stage in the bankruptcy proceedings, and such disclosure indicates that the Debtor is being honest and forthright in supplying information to his creditors and this Court. Movant has failed to establish that the Debtor’s ownership of various legal entities implicates fraud, dishonesty, or gross mismanagement. As such, Movant has failed to meet its burden of proof in establishing that cause exists for the appointment of a trustee.

c. **Movant has failed to establish that the Judgment entered against the Debtor in state court constitutes cause for appointment of a trustee, and Movant has further failed to establish that the Debtor violated pre-petition court orders related to that Judgment.**

Movant appears to be contending that the Judgment it obtained against the Debtor in state court, as well as subsequent state court orders aiding in the enforcement thereof, will give rise to cause for appointment of a trustee. Although Movant asserts that the Debtor fraudulently “induced” it to invest in the construction of a marina, the Second Amended Judgment in favor of Movant appears to be based on a money obligation owed to Movant and makes no mention of fraud. *See* Exhibit “B” to Motion. Neither has Movant otherwise offered evidence in support of its conclusory allegations that the Debtor committed fraud. Moreover, the fact that Movant has not yet succeeded in collecting on its Judgment against the Debtor does not suggest that the Debtor engaged in fraud, dishonesty, or gross mismanagement or that cause otherwise exists for appointing a trustee. If such were the case, appointment of a trustee would be a fairly routine activity in Chapter 11 cases, as opposed to the unusual and extraordinary remedy that it is.

Moreover, Movant has not established that the Debtor violated any pre-petition state court orders that were entered in aid of enforcement of its Judgment against the Debtor.

1 Movant points out that the Debtor listed monthly income on his Schedule I and reported
2 year-to-date income in the amount of \$78,920.53 on his Statement of Financial Affairs.
3 Based on the foregoing, Movant unfoundedly concludes that the Debtor *must* have violated
4 the pre-petition state court orders that prohibit the Debtor's wholly owned entities from
5 making distributions to him. However, the Debtor's filing of his Voluntary Petition in this
6 case had the effect of staying those state court orders such that Movant would no longer be
7 able to enforce its Judgment through its state court remedies without first obtaining relief
8 from the automatic stay. Thus, the fact that the Debtor has listed an estimate of his average
9 or projected regular monthly income on Schedule I does not establish that the Debtor violated
10 pre-petition state court orders.

11 Similarly, the fact that the Debtor discloses having received \$78,920.53 year to date
12 does not establish that he violated any pre-petition court orders. Even though the order
13 appointing a receiver to aid in execution of the Judgment was entered in state court on
14 February 22, 2011, Movant has not established that the \$78,920.53 year-to-date income
15 reported on the Debtor's Statement of Financial Affairs was not received sometime prior to
16 February 22, 2011. Given that the Debtor owns stocks and other interests in various business
17 entities and reports owning personal property worth \$858,203.00, it is not implausible that
18 the Debtor could have received \$78,920.53 sometime between January 1, 2011 and February
19 22, 2011. *See* Schedule B, attached as Exhibit "G" to Motion. Thus, Movant has not
20 presented evidence to support its contention that the Debtor violated pre-petition state court
21 orders. Once again, Movant has failed to meet its burden of proof that cause exists for the
22 appointment of a Chapter 11 trustee.

23 d. **The Debtor's inability to recall from memory the disposition of**
24 **certain funds received pre-petition cannot serve as the basis for**
25 **appointment of a Chapter 11 trustee.**

26 Movant's allegation that the Debtor "entered into at least three significant financial
27 transactions, involving millions of dollars, and has no plausible explanation of the disposition
28 of the funds," is not supported by the evidence and cannot serve as the basis for establishing

1 cause under 11 U.S.C. section 1104. In support of Movant’s allegation that the Debtor “has
2 no plausible explanation” of the disposition of millions of dollars, Movant relies on certain
3 deposition testimony of the Debtor, which Movant has taken out of context and
4 misconstrued. Specifically, Movant places great significance on the Debtor’s testimony that
5 he did not recall what he did with the proceeds of a \$1,000,000.00 loan he took out against a
6 brokerage account a couple years prior to his deposition and that he could not recall what he
7 did with a \$250,000.00 check he received for selling his interest in a restaurant
8 approximately a year prior to this deposition. *See* Motion, 6:8-20, 6:22–7:9. Movant further
9 takes aim at the Debtor’s testimony that he did not recall the amount of funds he received
10 from the Omni loan and makes an inflammatory allegation that Omni will have “difficulty
11 explaining how a \$7,060,000 loan turned into a \$13 million liability in four years.” *See*
12 Motion, 5:15 – 6:4. However, the Debtor’s very schedules list a \$13,000,000.00 debt owed
13 to Omni. *See* Schedule D, attached as Exhibit “G” to Motion. Moreover, Omni will have no
14 trouble providing evidence of its advances to the Debtor and/or his companies, which is
15 supported by the fact that Omni already *did* provide Movant with proof of its advances in the
16 principal sum of \$10,000,000.00. *See* Exhibit “K” to Motion.

17 While it may seem inconceivable to some that an individual would not recall exactly
18 what he or she did with more than a million dollars or the amount of proceeds he or she
19 received from a large loan, this particular Debtor has been involved in numerous multi-
20 million dollar transactions on a regular basis throughout many years. As such, the mere fact
21 that the Debtor may not recall from memory alone the precise disposition of a particular
22 advance of funds received years ago, albeit a large sum of money, does not, in itself,
23 establish fraud, dishonestly, or gross mismanagement. At most, the Debtor’s inability to
24 recall the precise disposition of those funds may suggest some level of mismanagement that
25 falls short of the “gross mismanagement” required to be shown pursuant to 11 U.S.C. section
26 1004. Indeed, courts have recognized that nearly every insolvency case involves some
27 degree of mismanagement or incompetence and that a finding of more than simple
28 mismanagement or incompetence is required as grounds for the appointment of a Chapter 11

1 trustee. *See, e.g., In re Evans*, 48 B.R. at 47; *In e Daily*, 2009 Bankr. LEXIS 3377, at *8
2 (Bankr. M.D. Tenn. Oct. 19, 2009). Movant has not met his burden of proving that fraud,
3 dishonesty, gross mismanagement, or other cause exists for ordering the appointment of a
4 trustee.

5 e. **The Debtor's intent to value certain assets of the estate and claim**
6 **certain exemptions does not establish an irreconcilable conflict of**
7 **interest.**

8 Movant contends that the Debtor has an irreconcilable conflict of interest with the
9 bankruptcy estate because he seeks to value certain assets of the bankruptcy estate and claims
10 certain exemptions. However, it is not uncommon for Chapter 11 debtors to bring motions to
11 value collateral. Similarly, virtually all Chapter 11 debtors claim at least some property
12 exemptions. In support of its assertion that the Debtor has undervalued its assets in this case,
13 Movant relies on a 2007 financial statement of the Debtor. However, it is not difficult to
14 imagine that the values of property of the estate would have decreased during the recession
15 that has taken place since 2007. Moreover, the Debtor may have further encumbered his
16 assets between January 1, 2008 and the date on which he filed his Voluntary Petition.

17 In addition, Movant has not offered any evidence to support its conclusory allegation
18 that the Debtor's assets have been undervalued. Finally, it should be pointed out that the
19 Bankruptcy Code contains certain built-in mechanisms for ensuring that the valuation of
20 collateral and determination of exemptions will be decided fairly by way of allowing
21 interested parties to contest the value of collateral and a debtor's claimed exemptions.
22 Movant has failed to meet its burden of proof that the Debtor has an irreconcilable conflict of
23 interest with the bankruptcy estate that would constitute cause for appointment of a Chapter
24 11 trustee.

25 2. **Appointment of a Chapter 11 Trustee Would Not Be in the Best Interests**
26 **of Creditors or the Bankruptcy Estate.**

27 Movant alleges that appointment of a trustee in this Chapter 11 case would best serve
28 the interests of creditors in order to facilitate a liquidation of the Debtor's assets. However,

1 the Movant's argument that such an appointment would best serve the interests of the
2 creditors is flawed because it presupposes that the Debtor has engaged in fraud or other
3 dishonesty. Movant continues to assert unfounded and conclusory allegations that the Debtor
4 has engaged in "questionable transactions" and "cannot be trusted" as a basis for asserting
5 that appointment of a trustee would serve the best interests of creditors. However, for the
6 reasons set forth above, Movant has failed to offer evidence sufficient to support a finding
7 that the Debtor engaged in fraud, dishonesty, or gross mismanagement. As such, Movant has
8 not established that appointing a trustee would best serve the interests of the creditors and the
9 bankruptcy estate.

10 In addition, Movant's argument that appointment of a Chapter 11 trustee would best
11 serve the interests of creditors completely ignores the costs associated with appointment of a
12 trustee, all of which would be charged against the bankruptcy estate and significantly reduce
13 the assets available for distribution to creditors. In determining whether appointment of a
14 trustee is in the best interests of creditors and the bankruptcy estate, courts should weigh the
15 costs of appointment against the benefits, if any. While there are obvious tangible costs to be
16 considered, such as the cost of the trustee and the trustee's legal counsel, courts should also
17 consider intangible costs, such as the costs of delay and "education" of the trustee. *See*
18 *Collier Bankruptcy Manual, 3d Edition Revised*, Chapter 11 Bankruptcy Code,
19 Reorganization ("Collier Bankr. Manual, Chp. 11"), P 1104.02 [3][d][ii] (Matthew Bender &
20 Company, Inc. 2010); *see also In re Adelpia Communications Corp.*, 336 B.R. 610 (Bankr.
21 S.D.N.Y. 2006). Moreover, it is the best interests of the estate generally that must be
22 considered, as opposed to the interests of a particular creditor or creditors. *See Collier Bankr.*
23 *Manual, Chp. 11, P 1104.02 [3][d][i]*; *see In re Daily*, 2009 Bankr. LEXIS 3377, at *12-13
24 ("[u]nder 11 U.S.C. § 1104(a)(2), a creditor, no matter how dominant, cannot justify the
25 appointment of a trustee simply because it would be in its own interests"). A creditor who
26 seeks an order appointing a Chapter 11 trustee must show that the appointment is in the
27 interests of all persons who have a stake in the bankruptcy estate, including the debtor and
28 the debtor's family. *In re Daily*, 2009 Bankr. LEXIS 3377, at *13.

Here, the appointment of a Chapter 11 trustee would result in the incurrence of significant costs to the bankruptcy estate, all without an apparent benefit to creditors. The Debtor in this case stands in a unique position of being the best person to facilitate the liquidation of his assets. Here, the Debtor does not own any real property, and the majority of his assets consist of intangible personal property, including stocks and interests in various companies. *See* Schedules A, B, and C, attached as Exhibit “G” to Motion. As such, the Debtor is most familiar with the assets of the bankruptcy estate and should be able to liquidate the assets of the underlying companies in which he holds an interest or otherwise locate interested parties to purchase his ownership interests in those companies. If a neutral party were appointed as a Chapter 11 trustee, he or she would be unfamiliar with the various businesses in which the Debtor holds an interest and may experience difficulties and delays in taking actions on behalf of the Debtor’s business entities to further the liquidation process. Such a trustee would not have the personal contacts that this Debtor maintains in connection with its various business entities and would have a much more difficult time locating interested parties to purchase the Debtor’s interests in said entities. Because Movant has not established that an order appointing of a trustee would be in the interests of all creditors and the bankruptcy estate generally, the Motion should be denied.

III.

CONCLUSION

For the foregoing reasons, Movant has not met its burden of proving that appointment of a trustee is warranted in this Chapter 11 case. As such, this Court should deny the Motion.

Dated: October 11, 2011

**POWELL & POOL,
A PROFESSIONAL CORPORATION**

By: /s/ Jessica L. Giannetta
JESSICA L. GIANNETTA, Attorneys
for OMNI FINANCIAL, LLC